In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 337

DOMINICK BARTONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On September 20, 1962, petitioner's probation on a charge of attempting to export munitions illegally was revoked after a hearing in the United States District Court for the Southern District of Florida. The judge orally sentenced him to imprisonment for one year (R. 127). On the same date a written judgment was entered committing petitioner to imprisonment for one year and one day (R. 107).

On appeal, petitioner challenged the revocation of probation and also claimed that the court erred in

entering a written judgment which differed from the oral sentence. The government acknowledged that the written judgment was in error. The court of appeals affirmed the revocation of the probation, *per curiam*, without ruling on the validity of the sentence.

The only point raised by the petition for a writ of certiorari is the purported increase in the written sentence over the oral pronouncement. The government has never denied that the written record may be corrected to conform to the oral announcement. The correct procedure, however, is by a motion in the district court to correct sentence. Since there was no showing that the matter had been properly presented to the district judge, there was no occasion for the court of appeals to pass on the question. By the same token, it is not a matter for review by this Court.

Under the provisions of 18 U.S.C. 4161, petitioner may lose one day of good time each month by having his total sentence reduced by one day. Thus it is peculiarly appropriate to require petitioner affirmatively to request this correction in the district court before an order is entered which may result in a net loss.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

AUGUST 1963.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1963 697919 143

MICRO CARD
TRADE MARK ®
22
PC 35
MATTHEW BENDER & COMPANY
MB
6-64
microcard